53D JUDGE ADVOCATE OFFICER GRADUATE COURSE

SIXTH AMENDMENT

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JULY 2004

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53D JUDGE ADVOCATE OFFICER GRADUATE COURSE

SIXTH AMENDMENT

I. INTRODUCTION

A. "In all criminal prosecutions, the accused shall enjoy the right to a . . . **public trial** . . . to be **confronted** with the witnesses against him; to have **compulsory process** for obtaining witnesses in his favor, and to have the **Assistance of Counsel** for his defence." **U.S. CONST. amend. VI.**

B. Confrontation.

C. Compulsory process.

D. Assistance of counsel.

E. Public Trial.

II. WAYS TO SATISFY THE CONFRONTATION CLAUSE

A. Produce the witness. Producing the witness will satisfy the Confrontation Clause even if the witness cannot be cross-examined effectively. The Confrontation Clause guarantees an *opportunity* to cross-examine witnesses. There is no right to *meaningful* cross-examination.

1. *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam). The Court held that an expert witness' inability to recall what scientific test he had used did not violate the Confrontation Clause even though it frustrated the defense counsel's attempt to cross-examine him. "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony."

2. *United States v. Owens*, 484 U.S. 554 (1988). While in the hospital, the victim identified the accused to an FBI agent. At trial, due to his injuries, which affected his memory, the victim could only remember that he earlier identified the accused. The victim was under oath and subject to cross-examination; the Confrontation Clause was satisfied.

3. *United States v. Gans*, 32 M.J. 412 (C.M.A. 1991). The military judge admitted into evidence a sexual abuse victim's statement given thirty months earlier to MPs as past recollection recorded (Mil.R.Evid. 803(5)). At trial, victim could not remember details of sexual abuse incidents. Appellant claimed that because the daughter's recollection was limited, his opportunity to cross-examine was limited. The Court of Military Appeals disagreed, relying on the *Fensterer* and *Owens* decisions that there is no right to *meaningful* cross-examination**.**

4. *United States v. Lyons*, 36 M.J. 183 (C.M.A. 1992). Appellant convicted of raping the deaf, mute, mentally retarded, 17-year-old daughter of another service member. The victim appeared at trial, but her responses during her testimony were "largely substantively unintelligible" because of her infirmities. In light of her inability, the government moved to admit a videotaped reënactment by the victim of the crime. The military judge admitted the videotape as residual hearsay over defense objection. Appellant asserted that his right to confrontation was denied because the daughter's disabilities prevented him from effectively cross-examining her. The lead opinion assumed that the victim was unavailable and decided the case on the basis of the admission of a videotaped reënactment. Chief Judge Sullivan, Judges Cox and Crawford did not perceive a confrontation clause issue because the victim testified.

5. *See also United States v. Spotted War Bonnet*, 933 F.2d 1471, 1473 (8th Cir. 1991) (quoting *California v. Green*, 399 U.S. 149 (1970)); *United States v. Casteel*, 45 M.J. 379 (1996).

B. Waiver.

1. *United States v. Martindale*, 40 M.J. 348 (C.M.A. 1994). During a deposition and again at an Article 39(a) session, a 12-year-old boy could not or would not remember acts of alleged sexual abuse. The military judge specifically offered the defense the opportunity to put the boy on the stand, but defense declined. Confrontation was waived and the boy's out-of-court statements were admissible.

2. *United States v. McGrath*, 39 M.J. 158 (C.M.A. 1994). Government produced the 14-year-old daughter of the accused in a child sex abuse case. The girl refused to answer the trial counsel's initial questions, but conceded that she had made a previous statement and had not lied in the previous statement. The military judge questioned the witness, and the defense declined cross-examination. The judge did not err in admitting this prior statement as residual hearsay.

3. *United States v. Bridges*, 55 M.J. 60 (2001). The Court of Appeals for the Armed Forces [hereinafter CAAF] held that the Confrontation Clause was satisfied when the declarant took the stand, refused to answer questions, and was never cross-examined by defense counsel. The military judge admitted the declarant's hearsay statements into evidence. While a true effort by the defense counsel to cross-examine the declarant may have resulted in a different issue, the defense's clear waiver of cross-examination in this case satisfied the Confrontation Clause. Once the Confrontation Clause was satisfied, it was appropriate for the military judge to consider factors outside the making of the statement to establish its reliability and to admit it during the government case-in-chief under the residual hearsay exception.

C. Forfeiture.

1. *United States v. White*, 116 F.3d 903 (1997) (per curiam). Misconduct leading to the loss of confrontation rights also necessarily causes the defendant to forfeit hearsay objections (witness murdered). A defendant's actions that make it necessary for the government to resort to such proof should be construed as a forfeiture of the protections afforded under both the Confrontation Clause and the rules of evidence.

2. *United States v. Clark*, 35 M.J. 98 (C.M.A. 1992). Accused's misconduct in concealing the location of the victim and her mother waived any constitutional right the accused had to object to the military judge's ruling that the victim was "unavailable" as a witness.

3. *United States v. Paaluhi*, 50 M.J. 782 (N-M. Ct. Crim. App. 1999). The Navy-Marine Court found the child victim's unavailability was a direct result of the actions of the appellant and members of his family acting on his behalf, with both his knowledge and approval. As a result, the appellant waived any evidentiary or constitutional right to object to the military judge's subsequent ruling that the witness was unavailable.

III. CONFRONTATION AND TESTIMONIAL HEARSAY

A. The paradigm for analyzing a hearsay's statement compliance with the requirements of the Confrontation Clause changed dramatically with the case of *Crawford v. Washington*, 124 S. Ct. 1354 (2004). The Supreme Court specifically overruled *Ohio v. Roberts* 448 U.S. 56 (1980) (holding that a hearsay statement possesses sufficient indicia of reliability to satisfy the Confrontation Clause if the statement falls into a "firmly rooted" exception to the hearsay rule OR (2) if the hearsay statement possesses sufficient "particularized guarantees of trustworthiness") and held that a reliability guarantee is insufficient to satisfy the

requirements of the Confrontation Clause. The Clause demands that before a testimonial statement of a hearsay declarant is admitted the prosecution must show that the witness is unavailable and that the accused has a prior opportunity to cross-examine the declarant.

1. Crawford was charged with assault and attempted murder when he stabbed the victim during an altercation that arose from the victim's alleged attempt to rape Crawford's wife, Sylvia. Sylvia led Crawford to the victim's apartment, thus facilitating the assault. Police arrested both Crawford and Sylvia and advised them of their *Miranda* rights. Crawford claimed self-defense. Sylvia gave a recorded statement that the prosecution contended significantly undermined the accused's claim of self-defense. At trial, the accused invoked Washington's marital privilege to prevent Sylvia's recorded statement from being introduced. The prosecution then sought to admit her statement as a statement against penal interest. Crawford claimed that the statement's admission would violate his right to confrontation. In admitting the statement, the trial court used the *Roberts* model to arrive at its conclusion that the statement possessed particularized guarantees of trustworthiness.

2. The Washington Court of Appeals reversed Crawford's conviction, applying a nine-factor test to determine that Sylvia's statement did *not* possess sufficient particularized guarantees of trustworthiness. The Washington Supreme Court unanimously reinstating Crawford's conviction finding that the interlocking nature of the statements (the accused's and Sylvia's), Sylvia's statement bore sufficient guarantees of trustworthiness.

3. Justice Scalia, writing for a seven-member majority, reviewed the pedigree of the confrontation clause and its meaning in English common law and early American jurisprudence. His review generated two important inferences: (1) the Confrontation Clause principally was directed against the civil-law mode of criminal procedure, particularly its use of *ex parte* examinations against a criminal defendant (*Crawford*, 124 S. Ct. at 1363) and (2) "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id*. at 1365.

    a) Regarding the first inference, Justice Scalia noted that the Framers' focus on the mode of criminal procedure means that "not all hearsay implicated the Sixth Amendment's core concerns." *Id*. at

1364. *Testimonial*[1] hearsay, however, does have Sixth Amendment implications when the declarant is not available and was not subjected to a prior opportunity for cross-examination. **The Court refused to define the parameters of "testimonial," but noted that, at a minimum, the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 1374.**

b) Regarding the second inference, the Court determined that the Sixth Amendment incorporates the common law (as understood in 1791) limitations on the admissibility of an absent witness's examination "on unavailability and a prior opportunity to cross-examine." *Id.* at 1366.

4. The Court overruled *Roberts* declaring that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 1370. Most notable, the Court stated, "[The Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.*

5. The Court held "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374. Where nontestimonial evidence is at issue, however, "it is wholly consistent with the Framers' design to afford the States flexibility in the development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.*

B. What *Crawford* means to many of the previously admissible (for both evidentiary as well as Confrontation Clause purposes) hearsay statements under the rubric of "firmly rooted" is unclear. The Court sought to downplay the *Crawford*

[1] Justice Scalia listed the various formulations of the class of "testimonial" statements: "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarants would reasonably expect to be used prosecutorially [citation omitted]; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions [citation omitted]; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial [citation omitted]." *Crawford*, 124 S. Ct. 1364, at 1364.

decision's impact on such cases as *White v. Illinois*, 502 U.S. 346 (1992)[2] by noting that *White* involved the very narrow question of whether the *Roberts* unavailability requirement applied to excited utterances and statements made for medical diagnosis and treatment. *See Crawford*, 124 S. Ct. at 1368 n8.

C. Also unclear is the decision's impact on the residual hearsay rule, where the *Roberts* test came into play most often. Will the character of the statement weigh more? Will the purpose for which the statement was made be dispositive? What does the intent of the speaker mean to the analysis?

D. Early interpretations.

1. *People v. Sisaveth*, No. F041885, 2004 Cal. App. LEXIS 820 (Cal. Ct. App. May 27, 2004) (holding that child sexual abuse victim's statement to police officer responding to call was testimonial because it was knowingly given in response to structured police questioning; statement made to a forensic interview specialist at a county facility for interviewing children suspected of being victims of abuse and made after the complaint and information were filed was testimonial because it was made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial).

2. *People v. Vigil*, No. 02CA0833, 2004 Colo. App. LEXIS 1024 (Colo. Ct. App. June 17, 2004) (holding that child sexual abuse victim's videotaped statement to law enforcement was interrogation and testimonial; excited statements statements to father and father's friend were not testimonial because those statements were not solemn or formal statements and were made to persons unassociated with government activity; statements to a doctor who examined and interviewed child after incident at the request of law enforcement were testimonial because the statements were made under circumstances that would lead an objective witness reasonably to believe that they would be used for later prosecution).

3. *In re R.A.S.*, No. 03CA1209, 2004 Colo. LEXIS 1032 (Colo. Ct. App. June 17, 2004) (holding that child sexual abuse victim's videotaped

[2] *White* involved four statements made by a 4-year-old victim of sexual assault: one statement to a babysitter made immediately after the defendant left the bedroom she was sleeping in. The victim made a second statement to her mother, who arrived approximately thirty minutes after the assault. The victim made a consistent third statement to a police officer who arrived approximately forty-five minutes after first screaming. The victim also made statements to medical personnel (a nurse and a doctor) approximately four hours after the attack. The first three statements were deemed "spontaneous declarations" and the last two were "medical examination" statements and all were admitted over objection. The victim never testified at trial. *White v. Illinois*, 502 U.S. 346, 348-350 (1992).

statement to police investigator was interrogation and therefore, testimonial).

4. *People v. Compan*, No. 02CA1469, 2004 Colo. App. LEXIS 865 (Colo. Ct. App. May 20, 2004) (holding that domestic violence victim's statements to a friend and a doctor were not testimonial because the statements were not solemn or formal declarations; observing also that "it appears that testimonial statements under *Crawford* will generally be (1) solemn or formal statements (not casual or off-hand remarks), (2) made for the purpose of proving or establishing facts in judicial proceedings (not for business or personal purposes), (3) to a government actor or agent (not to someone unassociated with government activity")).

5. *State v. Rivera*, 844 A.2d 191 (Conn. 2004) (holding that nephew's testimony at defendant's trial about what his uncle (a co-conspirator of the defendant's) told him about the defendant's involvement in a murder was outside the "core class" of testimonial statements in *Crawford* because the uncle's statement was in confidence on his own initiative to a close family member well before the defendant's arrest and more than four years before the uncle's arrest).

6. *Demons v. State*, No. S04A0413, 2004 Ga. LEXIS 274 (Ga. Mar. 29, 2004) (holding that decedent's statements to a co-worker about the source of bruises on his upper arms and chest and about a threat communicated by the defendant "were not remotely similar" to prior testimony or police interrogation and, therefore, were not testimonial).

7. *People v. Patterson*, 808 N.E.2d 1159 (Ill. App. Ct. 2004) (holding that admission of witness's grand jury testimony violated the Confrontation Clause).

8. *Hammon v. State*, No. 52A02-0308-CR-693, 2004 Ind. App. LEXIS 1099 (Ind. Ct. App. June 14, 2004) (police officer's testimony about what assault victim said to him about her attacker was not testimonial; "whatever else police 'interrogation' might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it occurred").

9. *Fowler v. State*, No. 49A02-0310-CR-930, 2004 Ind. App. LEXIS 1103 (Ind. Ct. App. June 14, 2004) (excited utterance of domestic abuse victim to responding police officer was not testimonial; "Officer Decker's questioning of A.R. at the scene of the incident just minutes after it occurred does not qualify as classic 'police interrogation' as referred to in *Crawford*").

10. *Snowden v. Maryland*, No. 2933, 2004 Md. App. LEXIS 32 (Md. Ct. Spec. App. Apr. 5, 2004) (holding that child sexual abuse victims' statements to social worker who interviewed the victims for the purpose of developing their testimony were testimonial).

11. *People v. Geno*, No. 241768, 2004 Mich. App. LEXIS 1067 (Mich. Ct. App. Apr. 27, 2004) (holding statement at issue was not testimonial because the child sexual abuse victim's statement was made to nongovernmental employee (although interview arranged by Children's Protective Services) and victim's answer to question whether she had an "owie" was not a statement in the nature of "ex parte in-court testimony or its functional equivalent").

12. *City of Las Vegas v. Walsh*, No. 41317, 2004 Nev. LEXIS 49 (Nev. June 11, 2004) (healthcare professional's affidavit prepared solely for the prosecution's later use at trial was testimonial).

13. *People v. Moscat*, No. 2003BX044511, 2004 N.Y. Misc. LEXIS 231 (N.Y. Crim. Ct. Mar. 25, 2004) (holding that a 911 call is not testimonial as the term is used in *Crawford* because the call is generated by an "urgent desire of a citizen to be rescued from immediate peril" rather than a desire on the government's part to seek evidence against a particular suspect).

14. *People v. Cortes*, No. 658/02, 2004 N.Y. Misc. LEXIS 663 (N.Y. App. Div. May 26, 2004) (holding that "[w]hen a 911 call made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding" that the call is testimonial because such calls are formal in that they follow established procedures, rules, an patterns of information collection, therefore, falling within the *Crawford* definition of interrogation).

15. *People v. Rivera*, No. 3798, 2004 N.Y. App. Div. LEXIS 7825 (N.Y. App. Div. June 8, 2004) (in *dicta*, noting that a victim's girlfriend's telephoned statement to victim's sister identifying the defendant as assailant would not be testimonial).

16. *State v. Forrest*, No. COA03-806, 2004 N.C. App. LEXIS 827 (N.C. Ct. App. May 18, 2004) (holding that assault victim's statement to law enforcement immediately after defendant's arrest was not testimonial because such a statement is not police interrogation under *Crawford*).

17. *State v. Allen*, No. 80556, 2004 Ohio App. LEXIS 2764 (Ohio Ct. App. June 17, 2004) (holding that statement of co-defendant to police was testimonial).

18. *Cassidy v. State*, No. 03-03-0098-CR, 2004 Tex. App. LEXIS 4519 (Tex. App. May 20, 2004) (holding that aggravated assault victim's statement to law enforcement at the hospital after the assault was not testimonial).

19. *United States v. Saner*, 313 F. Supp. 2d 896 (S.D. Ind. 2004) (holding that co-defendant's statement to Department of Justice prosecutor are testimonial because the DoJ prosecutor's interview was generated by a desire to gather evidence against the declarant and other potential defendants to be used at trial).

20. *United States v. Manfre*, Nos. 03-2239WA, 03-2394WA, 2004 U.S. App. LEXIS 9162 (8th Cir. May 11, 2004) (noting that deceased co-conspirator's statements to his brother about defendant's involvement in arson were not testimonial because they were not the kind of memorialized, judicial-process-created evidence defined in *Crawford*).

E. From the cases above, it is clear that, at this point, there is no consensus on what "testimonial" means outside of the parameters that the Supreme Court provided – prior testimony at a preliminary or grand jury hearing, at a trial or police interrogation. And even with "police interrogation," there is disagreement among the courts as to the precise definition. Given this area's early development, it is incumbent on the trial practitioner to maintain a watchful eye on developments in this area of the law.

IV. COMMENT ON EXERCISING SIXTH AMENDMENT RIGHTS

A. *United States v. Kirt*, 52 M.J. 699 (N-M. Ct. Crim. App. 2000). The accused testified at trial and was asked during cross-examination, "Do you admit here today that you are the only witness in this court who has heard the testimony of every other witness?" On appeal, the accused argued that this question improperly invited the members to infer guilt from the appellant's exercise of his constitutional right to testify and confront the witnesses against him. The Court held that the question did not constitute error, but if it did, it was waived and did not constitute plain error.

B. *Portuondo v. Agard*, 529 U.S. 61 (2000). In summation, the prosecutor commented that the defendant had the benefit of getting to listen to all other witnesses before testifying, giving the defendant a "big advantage." The defendant argued that the prosecutor's comments on his presence and ability to fabricate unlawfully burdened his Sixth Amendment right to be present at trial

and to be confronted with witnesses against him and his Fifth and Sixth Amendment right to testify on his own behalf. The Court rejected the defendant's arguments distinguishing comments that suggest exercise of a right is evidence of guilt and comments that concern credibility as a witness.

V. LIMITATIONS ON CROSS-EXAMINATION

A. Cross-examination is an important part of the right to confront witnesses. The right to confrontation, however, is not absolute. The courts balance the competing state interest(s) inherent in rules limiting cross-examination with the accused's right to confrontation.

1. "The right of cross-examination is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

2. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

3. "[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

4. "[T]he right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295.

5. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

6. Although a criminal defendant waived his rights under the Confrontation Clause to object to the admission of hearsay statements because of his misconduct in intimidating a witness, he did not also forfeit his right to

cross-examine that same witness. *Cotto v. Herbert*, 331 F.3d 217 (2d Cir. 2003).

B. **Juvenile Convictions of Key Prosecution Witness.** *Davis v. Alaska*, 415 U.S. 308 (1974). The exposure of a witness's motivation is a proper and important function of cross-examination, notwithstanding state statutory policy of protecting the anonymity of juvenile offenders.

C. **Voucher Rule.** *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The defendant was deprived of a fair trial when he was not allowed to cross-examine a witness who had confessed on numerous occasions that he committed the murder. The Court observed that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined (citations omitted).

D. **Ability to remember.** *United States v. Williams*, 40 M.J. 216 (C.M.A. 1994). Judge erred in precluding defense from cross-examining government witness (and accomplice) to robbery about drug use the night of the robbery.

E. **Bias**.

1. *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Judge improperly restricted defense cross-examination of government toxicology expert who owned stock in the lab that tested accused's urine sample pursuant to a government contract. Questions about the expert's salary were relevant to explore bias. Judge also erred in preventing defense from asking the defense expert about possible sources of contamination of the urine sample.

2. *United States v. Gray*, 40 M.J. 77 (C.M.A. 1994). Accused was charged with indecent acts with nine-year-old daughter of SGT M and sodomy and adultery with SGT M's wife. Evidence that DHS had investigated the "victim's" family was improperly excluded. Mrs. M. could have accused Gray of the offenses to divert attention away from her dysfunctional family and the evidence would have corroborated Gray's claim that he visited Mrs. M's home in response to requests for help. This violated accused's right to present a defense.

F. **Motive to lie.** *United States. v. Everett*, 41 M.J. 847 (A.F.C.M.R. 1994). The military judge improperly prevented the defense counsel from cross-examining a rape victim about her husband's infidelity and his physical abuse of her.

G. **Rule 412.** *See* Evidence outline.

VI. LIMITS ON FACE-TO-FACE CONFRONTATION

A. The Supreme Court.

1. *Coy v. Iowa*, 487 U.S. 1012 (1988). Appellant's confrontation rights were violated when a screen prevented the child victims from seeing him during their testimony. An Iowa statute provided for such protection without requiring a case-specific showing of necessity. The Court left for another day whether any exceptions existed to the requirement for face-to-face confrontation.

2. *Maryland v. Craig*, 497 U.S. 836 (1990). The child victim testified by one-way closed circuit television with a defense counsel and a prosecutor present. The testimony was seen in the courtroom by the accused, jury, judge, and other counsel.

a. The preference for face-to-face confrontation may give way if it is **necessary** to further an **important public policy**, but only where the **reliability of the testimony can otherwise be assured.**

b. **Necessity.** Before allowing a child victim to testify in the absence of face-to-face confrontation with the accused, the government must make a case specific showing that:

(1) the procedure proposed is necessary to protect the child victim,

(2) The child victim would be traumatized by the presence of the accused, and

(3) the emotional distress would be more than *de minimis*. What does *de minimis* mean? What's the constitutional minimum required? *See Marx v. Texas*, 987 S.W.2d 577 (Tex.). *See also United States v. McCollum*, 58 M.J. 323 (2003).

c. **Important Public Policy.** The state's interest in "protecting child witnesses from the trauma of testifying in a child abuse case" is an important state interest.

d. **Reliability Assured**. The Court stated that confrontation has four component parts that assure reliability. You preserve reliability by preserving as many of these component parts as possible in the proposed procedure.

(1) Physical presence;

(2) Oath;

(3) Cross-examination;

(4) Observation of the witness by the fact finder.

B. Military Cases.

1. *United States v. Anderson*, 51 M.J. 145 (1999).

a) The government used the testimony of a licensed psychologist to establish the facts necessary for the judge to make the findings required to use special courtroom arrangements for two child witnesses. The testimony of the psychologist is included in the opinion. *Id.* at 147-48.

b) The judge prescribed an elaborate procedure so that the victims could testify without facing the accused. Closed circuit television was used so the military judge, counsel, and the reporter could all see the testimony.

c) The instruction the judge gave the panel before the witnesses' testimony is included. *Id.*

2. *United States v. McCollum*, 58 M.J. 323 (2003). This case required CAAF to pass on the 1999 amendment to M.R.E. 611, subsection (d), added after the CAAF's decision in *Anderson*.

a) The military judge permitted a 12-year-old child victim to testify via two-way closed circuit television after finding the witness would be traumatized if required to testify in open court in the presence of the accused and that the witness would be unable to testify in open court in the accused's presence because of her fear that the accused would beat her. Accused absented himself IAW R.C.M. 804(c).

b) CAAF interpreted M.R.E. 611(d) consistently with *Maryland v. Craig*, finding that under the rule, the emotional distress required to justify the use of remote live testimony "must be sufficiently serious that it would prevent the child from reasonably testifying." *McCollum*, 58 M.J. at 331.

c) The military judge found that the victim would be unable to testify in the accused's presence because of both fear *and* trauma, linking the two concepts. CAAF noted that M.R.E. 611(d)(3)(A) and (B) are sufficient *independent of each of each other*, meaning that military judge must find that a witness will be unable to testify reasonably because of fear *or* trauma caused by the accused's presence. *Id.* Further, as long as the finding of necessity is based on the fear or trauma caused by the accused's presence alone, "it is irrelevant whether the child would also suffer some fear or trauma from testifying generally." *Id.* at 332.

d) CAAF also determined that a military judge is not required under the Sixth Amendment nor MRE 611(d) to interview or observe a child witness before making a necessity ruling. *Id.* at 333. In this case, the military judge made her determination based on unrebutted expert testimony, providing the judge with "sufficient expert-opinion testimony to make a finding" that the witness would suffer trauma and be unable to testify in the accused's presence.

e) The fear of a witness need not be fear of imminent harm nor need it be reasonable. Rather, the fear required under the rule must "be of such a nature that it prevents the child from being able to testify in the accused's presence." *Id.*

f) The witness indicated that she wanted to testify in the accused's presence, but the military judge, in assessing her ability to testify reasonably in the accused's presence, "was free, despite CS's desire, to defer to [the expert witness's] conclusion that CS would be harmed by testifying in front of Appellant." *Id.* fn 2.

3. **Options.** Several ways have been tried and approved by courts. They include:

a) **One-way closed circuit television**. *Maryland v. Craig*, 497 U.S. 836 (1990)*; U.S. v. Longstreath*, 45 M.J. 366 (1996).

b) **Two-way closed circuit television**. R.C.M. 914A; 18 U.S.C. § 3509.

c) **A partition**. *United States v. Batten*, 31 M.J. 205 (C.M.A. 1990). An elaborate courtroom arrangement to protect the child victim, which included screens and closed circuit television. Testimony by a psychologist to show the impact conventional testimony would have on the witness. Special findings by the military judge (judge alone trial) that he relied on the child's excited utterance and not on her courtroom testimony. Harmless error analysis by CMA as allowed by *Coy* and *Craig*. Case affirmed. *See also Coy v. Iowa*, 487 U.S. 1012 (1988).

d) **Witness testifying with her back to the accused but facing the judge, and counsel**. *United States v. Thompson*, 31 M.J. 168 (C.M.A. 1990). The child victims testified at a judge alone court-martial with their backs to the accused. The military judge, defense counsel, and trial counsel could see them. A psychologist testified for the government in support of the courtroom arrangement.

e) **Profile to the accused**. *United States v. Williams*, 37 M.J. 289 (C.M.A. 1993). Child victim testified from a chair in the center of the courtroom, facing the military judge with the defense table to the immediate left of her chair. The accused was not deprived of his right to confrontation even though he could not look into the witness' eyes. The witness testified in the accused's presence and he could see her face and demeanor.

f) **Whisper Method.** *United States v. Romey*, 32 M.J. 180 (C.M.A.). The child victim whispered her answers to her mother who repeated the answers in open court. The mother was certified as an interpreter. *Craig* was satisfied when "[t]he judge impliedly made a necessity finding in this case" (emphasis added). The military judge relied on representations made about the Article 32 testimony; trial counsel's pretrial discussions with the child witness; and the military judge's observations of the child at an Article 39(a) session in the accused's presence. The Court also held that the child victim was available for cross-examination, and the accused's due process rights were not violated.

4. **Article 32 Investigation.** *United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990). The child victim testified behind a partition at the Article 32 ivestigation. Accused could hear but not see the victim, but the defense counsel cross-examined him. The child testified at the court-

martial without the partition. Held: (1) right to face-to-face confrontation is a trial right; (2) Article 32, UCMJ, only provides for the right of cross-examination, not confrontation; (3) an Article 32 investigation is not a critical stage of the trial; (4) *Bramel* is comparable to *Kentucky v. Stincer*, 482 U.S. 730 (1987) (defendant excluded from competency hearing of child witness); and (5) the accused did not have the right to proceed *pro se* at the Article 32 investigation.

5. **Do not remove the accused from courtroom**. *See United States v. Daulton*, 45 M.J. 212 (1996) (accused watched testimony of daughter over closed circuit television; confrontation rights violated); *United States v. Rembert*, 43 M.J. 837 (Army Ct. Crim. App. 1996) (accused watched testimony of 13-year-old carnal knowledge victim via two-way television in the deliberation room; without ruling on Sixth Amendment, the Army Court agreed that accused's due process rights were violated). The accused may, under R.C.M. 804(c), voluntarily leave the courtroom to preclude the use of the procedures outlined in R.C.M. 914A.

C. **Can witnesses who are not victims use remote procedures**? Yes. Federal courts have interpreted 18 U.S.C. § 3509 to allow non-victim child witnesses to testify remotely. *United States v. Moses*, 137 F.3d 894 (6th Cir. 1998); *United States v. Quintero*, 21 F.3d 885 (9th Cir. 1994). Both cases interpret *Maryland v. Craig*. Both cases focus on the Court's approval of the state interest: "the state interest in protecting *child witnesses* from the trauma of testifying in a child abuse case." The courts do not comment on the fact that the four witnesses in *Craig* who testified remotely were all victims.

D. Other issues in remote testimony.

1. *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001). Appellant was convicted of robbing an Argentinean couple. At trial, the victims were unavailable to testify in person because of illness and unwillingness to return to the United States. The trial judge agreed to allow testimony via satellite over defense objection. Citing to *Maryland v. Craig*, the Court pointed out that the Confrontation Clause does not guarantee an absolute right to a face-to-face meeting between a defendant and witnesses; rather, the underlying purpose is to ensure the reliability of trial testimony. In this case, *Maryland v.Craig* was satisfied because (1) public policy considerations justified an exception to face-to-face confrontation, given the state interest "to expeditiously and justly resolve criminal matters that are pending in the state court system;" (2) the remote testimony was necessary, given the fact that the witnesses were absolutely essential to the government case and lived beyond the court's subpoena power; and (3) the testimony was reliable because the witnesses were able to see the jury and the defendant, they were sworn by the clerk of court, the jury and the

defendant were able to observe the witnesses testifying, and they were subject to cross-examination.

2. *U.S. v. McDonald*, 55 M.J. 173 (2001). Shortly before the presentencing portion of the court-martial, the government's only witness was notified of a unit deployment to the Middle East. He was at Fort Stewart, some distance from the trial location and was scheduled to report to the terminal at midnight that night for a departure at 0600 the next morning. Over defense objection, the military judge allowed the witness to testify by telephone. On appeal, the issue was whether the Sixth Amendment's Confrontation Clause applies to the presentencing portion of a court-martial. Agreeing with the Navy-Marine Corps Court of Criminal Appeals, the CAAF held that the Confrontation Clause does not apply to non-capital presentencing proceedings. However, the Due Process Clause of the Fifth Amendment requires that the evidence introduced in sentencing meet minimum standards of reliability. The Court pointed out that while the safeguards in the rules of evidence applied to the prosecution's sentencing evidence, the language of RCM 1001(e)(2)(D) allowed relaxation of the evidence rules and did not specifically prohibit telephonic testimony. CAAF also emphasized that this was an unusual situation causing the military judge to "craft a creative solution," lest the testimony be temporarily lost.

3. *United States v. Shabazz*, 52 M.J. 585 (N-M. Ct. Crim. App. 1999). The military judge allowed a government witness to testify via video teleconference. (VTC) The trial was in Japan; the witness testified from California. The Navy-Marine Corps Court found a violation of the right to confrontation because the trial judge did not do enough to control the remote location.

4. *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). The U.S. government asserted that Gigante was the boss of the Genovese crime family and supervised its criminal activity. Gigante was convicted of racketeering, criminal conspiracy under the RICO statute, conspiracy to commit murder, and a labor payoff conspiracy. The government proved its case with six former members of the Mafia, including Peter Savino. Savino was allowed to testify via closed circuit television because he was in the Federal Witness Protection Program and was in the final stages of an inoperable, fatal cancer. The Court held the trial judge did not violate Gigante's right to confront Savino. *See also Minnesota v. Sewell*, 595 N.W.2d 207 (Minn. App. 1999).

VII. RIGHT TO BE PRESENT AT TRIAL

A. General Rule. The accused has a right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Commonwealth*, 291 U.S. 97, 105-6 (1933).

B. Disruptive Accused.

1. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court held that a disruptive defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can be reclaimed if the defendant is willing to conduct himself consistently with the decorum and respect inherent in judicial proceedings.

2. RCM 804. A military judge faced with a disorderly and disruptive accused has 3 constitutionally permissible responses:

a) bind and gag the accused as a last resort, thereby keeping him present;

b) cite the accused for criminal contempt;

c) remove the accused from the courtroom until he promises to conduct himself properly.

C. Intentionally absent accused. Trial may continue in the absence of the accused when the accused voluntarily absents himself from trial. *Taylor v. United States*, 414 U.S. 17 (1912). *See also* R.C.M. 804(b) and *United States v McCollum*, 56 M.J. 837 (A.F. Ct. Crim. App. 2002), *aff'd*, 58 M.J. 323, (2003) (accused voluntarily absented himself so that child-victim could testify in the courtroom).

VIII. ASSISTANCE OF COUNSEL

A. The Sixth Amendment right to counsel attaches at preferral of charges. *United States v. Wattenbarger*, 21 M.J. 41 (C.M.A. 1985). It is offense specific. *Texas v. Cobb*, 532 U.S. 162 (2001) (using the *Blockburger v. United States*, 284 U.S. 299 (1932) elements test to define an offense); *NcNeil v. Wisconsin*, 501 U.S. 171 (1991); *United States v. Sager*, 36 M.J. 137 (C.M.A. 1992). The accused also maintains the right to assistance of counsel through appeal. *United States v. Dorman*, 58 M.J. 295, 297 (2003); UCMJ, art. 70(c); RCM 1202(b)(2).

B. Right to Counsel of Choice**.**

1. Conflict-free counsel.

a) *Mickens v. Taylor*, 535 U.S. 162 (2002). Appellant was convicted of premeditated murder and was sentenced to death. Appellant's attorney represented the victim at the time of the murder in an unrelated criminal matter. Appellant's attorney never disclosed to the trial court or to appellant that he had previously represented the victim. The Supreme Court held that because the appellant did not demonstrate that his counsel actively represented conflicting interests, his Sixth Amendment ineffective assistance of counsel claim failed. Since the Fourth Circuit found that the appellant failed to demonstrate prejudice by showing that the conflict significantly affected his counsel's performance, the Supreme Court affirmed the conviction.

b) *United States v. Cain*, 57 M.J. 733 (Army Ct. Crim. App. 2002), *rev'd*, 59 M.J. 285 (2004). Appellant convicted pursuant to his pleas of two specifications of indecent assault in violation of Article 134, UCMJ. On initial review, the appellant alleged that he and his lead military defense counsel had a coerced homosexual relationship that denied him effective assistance of counsel. The Army Court ordered a *DuBay* hearing to determine the underlying facts. The relevant facts found were: MAJ S and the appellant entered into a consensual sexual relationship shortly before the Article 32, UCMJ investigation on 3 December 1997; the relationship continued until the conclusion of the trial about six months later; appellant told several people about the relationship, including two civilian attorneys, who told appellant that he should fire MAJ S because counsel's behavior was unethical and illegal; appellant did not fire MAJ S because he believed that was the best military defense counsel available; in January 1998, MAJ S detailed CPT L to the case at appellant's request because appellant thought he should have two counsel (given that there were two trial counsel); after consulting with the appellant and MAJ S (both of whom initially wanted to contest the case) and thoroughly reviewing the facts, CPT L initiated negotiations with the Government regarding a pretrial agreement; on 2 June 1998, the accused pled guilty and was found guilty by a military judge sitting as a general court-martial; on 6 June 1998, appellant's parents, without appellant's knowledge, sent a letter to the convening authority alleging that MAJ S pressured appellant into sexual favors; on 18 June 1998, LTC F, the TDS XO, informed MAJ S of the allegation; and the following morning, MAJ S killed himself.

(1) The right to effective counsel includes the right to representation free from conflicts of interest. *Wood v. Georgia*, 450 U.S 261, 271 (1981). Where alleged IAC arises from a conflict of interest, the Army Court applies the two-pronged test of *Cuyler v. Sullivan*, 446 U.S. 335 (1980). In that context, an accused who raises no objections at trial must show that an actual conflict of interest existed and that the conflict of interest adversely affected counsel's performance. If both elements are shown, prejudice is presumed. In cases of a guilty plea, the *Cuyler* test is modified: the accused must show an actual conflict of interest and that the conflict adversely affected the voluntary nature of the plea. Quoting *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996), the Army Court specifically noted that an accused must "point to specific instances in the record to suggest an actual conflict . . . [and] must demonstrate that the attorney made a choice between possible alternative courses of action" to the accused's detriment. The Army Court also noted that an accused may waive the right to conflict-free counsel, but such waiver must be made "voluntarily, knowingly, and intelligently with sufficient awareness of the relevant circumstances and likely consequences."

(2) Applying the above law, the Army Court found that the appellant failed to meet his burden and affirmed the case.

(a) The Army Court, noting that a counsel's sexual relations with a client do not create a *per se* actual conflict of interest, declined appellant's invitation to adopt a *per se* criminal conduct rule, whereby a conflict of interest would exist *per se* in cases where a defense counsel engages in criminal conduct with an accused. Although his conduct was similar to the charged misconduct of the appellant, MAJ S's conduct was unrelated to appellant's charged crimes. Therefore, there was no actual conflict on the facts. The Army Court found that MAJ S did not fear or risk exposure of the relationship by aggressively and effectively representing the appellant. In the Army Court's words, "[t]he best way to maintain appellant's confidence required that MAJ S represent appellant's interests to the utmost of his abilities, and that appellant know of MAJ S's efforts on his behalf. . . . In short, not

only did MAJ S and appellant's interests not conflict, in some respects, they converged."

(b) The Army Court held, that even if there were an actual conflict, the appellant waived it. Appellant had the benefit of talking to several people, including two civilian attorneys who told that appellant that MAJ S's conduct merited MAJ S's release. Notwithstanding that advice, appellant "wanted MAJ S to continue to represent him because he believed him to be the best military attorney available."

(c) Finally, the Army Court found that there was no evidence in the record that any conflict adversely affected the defense team's performance, appellant's decision to plead guilty, or the terms and conditions of appellant's guilty plea. Further, even if MAJ S labored under a conflict, CPT L did not, because CPT L knew nothing of appellant's and MAJ S's relationship. The Army Court declared, "Measuring the combined efforts of MAJ S and CPT L on behalf of appellant, it is difficult to imagine what more they could have done on his behalf to produce a more favorable result."

(3) In reversing the Army Court, the CAAF held "[t]he uniquely proscribed relationship before us was inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant." The CAAF focused on the relationship as constituting fraternization and a prohibited homosexual relationship, either one by itself subjected both MAJ S and appellant to punitive or adverse administrative action. These possible adverse consequences provided MAJ S with compelling motivation to place secrecy above trial strategy, thereby affecting his ability to provide objective advice to appellant on defense options. The CAAF did not find that the Army Court's analysis of the law was incorrect, rather that the lower court's determination that there was no conflict was incorrect. In reviewing ACCA's determination that even if there were a conflict that appellant waived it, the CAAF determined that neither civilian counsel whom appellant contacted "provided him with a detailed explanation of the relationship between the merits of the case and the attorney's ethical obligations." Therefore, "Appellant's

conversations with the two civilian attorneys in this case did not involve the type of informed discussion of the specific pitfalls of retaining Major S that would demonstrate a knowing, intelligent waiver of the right to effective assistance of counsel."

c) *United States v. McClain*, 50 M.J. 483 (1999). Accused waived the conflict of interest he created by accusing his defense counsel of collaborating with the prosecutor, lying, and general incompetence. After the military judge granted a three-day continuance to allow new counsel to prepare for trial, the accused talked to the prosecutor and decided to plead guilty. The accused then requested to be represented by the two original counsel detailed to defend him.

d) *United States v. Lindsey*, 48 M.J. 93 (1998). Accused clearly indicated in his unsworn statement that he was dissatisfied with his trial defense counsel. CAAF held that the military judge's abbreviated inquiry of accused (during the presentencing phase of the trial) to ferret out any potential counsel conflicts substantially satisfied the Sixth Amendment. Judge notified accused that he could either retain appointed counsel or represent himself *pro se*.

e) *United States v. Smith*, 48 M.J. 136 (1998). Trial defense counsel's statements of remorse and disappointment with the outcome of plea negotiations and sentencing case did not establish that his performance was ineffective under Sixth Amendment.

f) *Wheat v. United States*, 486 U.S. 153 (1988). Three co-defendants requested one defense counsel. A waiver was not sufficient. The Sixth Amendment guarantees effective representation but not necessarily counsel of choice. A presumption in favor of chosen counsel can be overcome by potential conflict. The trial judge makes this determination.

g) *United States v. Calhoun*, 47 M.J. 520 (A.F. Ct. Crim. App. 1997). Civilian attorney who conditioned his representation of accused on success in securing government payment of attorney fees created conflict of interest. Actual conflict of interest created since attorney effectively told accused if he prevailed on government payment of fees, then attorney would undertake representation; but if he failed to secure government payment, then client should go *pro se*.

h) *United States v. Smith*, 36 M.J. 455 (C.M.A. 1993). Need finding that counsel actively represented conflicting interests and actual conflict of interest adversely affected counsel's performance. If both prongs are established, prejudice is presumed. The existence of an actual conflict of interest does not automatically establish that the counsel's performance was affected.

i) *United States v. Jeffries*, 33 M.J. 826 (A.F.C.M.R. 1991). When potential conflict of interest exists, the military judge must "inquire into the propriety of multiple representation." *Id.* at 828. "If the military judge fails to conduct such an inquiry, a rebuttable presumption arises that the appellant was prejudiced by the conflict of interest caused by the multiple representation." *Id.* at 829.

j) *U.S. v. Beckley*, 55 M.J. 15 (2001). Conflict existed where an employee of civilian defense counsel's law firm previously represented appellant's then wife in a divorce proceeding against her husband. Alleged harassment and intimidation by SJA office did not change the calculus, where civilian defense counsel repeatedly stated on the record that he had to withdraw because of the conflict of interest.

k) *United States v. Washington*, 42 M.J. 547 (A.F. Ct. Crim. App. 1995). Sexual relations between civilian and military defense counsel may have showed poor judgment but did not *per se* create a conflict of interest.

l) *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992). Conflict when defense counsel advised his client against trial by a panel in favor of a trial by military judge alone because he believed that it was in the Army's best interests that every soldier be available for the upcoming ground war in the first Gulf War.

2. Does denial of continuance deprive accused of his counsel of choice?

a) *United States v. Phillips*, 56 M.J. 771 (C.G. Ct. Crim. App. 2002). The military judge in this case did not err in refusing to grant an open-ended continuance until the appellant's requested individual military counsel (IMC) would be available. Further, potentially protected communications that the appellant had with the IMC did not establish an attorney-client relationship, where the counsel was not previously detailed and was never authorized to represent the appellant in any capacity.

b) *United States v. Young*, 50 M.J. 717 (Army Ct. Crim. App. 1999). The trial judge did not abuse his discretion in denying the defense request for a continuance to hire a different civilian counsel where the defense had received a prior continuance, both counsel were at the Art. 32 investigation, and the delay would have caused witnesses to become unavailable.

c) *United States v. Phillips*, 37 M.J. 532 (A.C.M.R. 1993). An accused's right to counsel of choice is not absolute and must be balanced against society's interest in the efficient and expeditious administration of justice. The exercise of the right to civilian counsel cannot unreasonably delay the progress of a trial.

d) *United States v. Keys*, 29 M.J. 920 (A.C.M.R. 1989). Important lesson for military judges: Consider holding the Article 39(a) session "well before the projected trial date" so when the accused is advised of his rights he is provided an opportunity and time to exercise those rights. The accused was denied his request for civilian counsel retained the day before the Article 39(a) session and trial. Military judge denied the request for a two-week continuance because the witnesses would be inconvenienced. In this case, military judge should not have forced representation by detailed military counsel.

e) Defense goes on "strike." *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989). The military judge granted three defense continuances, but denied the fourth request. Both civilian and military counsel did nothing in the case other than move for a mistrial at the close of the government's case on the grounds that they were unprepared to try the case. In spite of this outrageous conduct, the military judge was commended for maintaining his temper and decorum throughout the trial. The "net result" was to deny appellant any assistance of counsel in violation of the Sixth Amendment.

f) *United States v. Wilson*, 28 M.J. 1054 (N.M.C.M.R. 1989). "Matters to be considered by the trial judge in granting or denying a continuance to resolve a scheduling conflict include the number and length of previous continuances, whether an additional continuance would inconvenience witnesses, opposing counsel or the court, and whether the delay would prejudice the accused."

3. Separation from active duty. *United States v. Spriggs*, 52 M.J. 235 (2000). The accused acquitted in his first court-martial. Later, new charges arose, and the accused discussed them with the counsel who represented him at

the first trial; the counsel was on terminal leave, working in a civilian law firm. At the end of his terminal leave, the counsel became an Army reservist. The accused requested his former counsel as IMC, but the request was denied. CAAF held that if a civilian attorney happens to be a reservist, that person's availability as IMC must be determined based on actions taken while on active duty, not actions as a civilian attorney. The routine separation of a judge advocate from active duty normally terminates the attorney-client relationship established while the judge advocate was on active duty.

C. Can the defense counsel sever the attorney-client relationship?

1. *United States v. Cornett*, 47 M.J. 128 (1997). CAAF held that military defense counsel's post-trial representation was deficient in that he attempted to withdraw without authority and without proper consultation with his client. The military defense counsel attempted to withdraw because the accused hired a civilian defense counsel for post-trial matters. Though military counsel was deficient, the appellant demonstrated no prejudice.

2. *United States v. Calhoun*, 47 M.J. 520 (A.F. Ct. Crim. App. 1997). Civilian defense counsel was ineffective in unilaterally withdrawing from representation, without leave of court, based on accused's failure to pay him. *United States v. Starks*, 36 M.J. 1160 (A.C.M.R. 1993). Once the attorney-client relationship is established, absent express release by the accused or good cause shown on the record, the trial defense counsel remains as counsel for the accused from preferral of charges until appointment of appellate defense counsel.

3. *United States v. Hawkins*, 34 M.J. 991 (A.C.M.R. 1992). The accused's right to continued representation of counsel cannot be terminated arbitrarily for administrative convenience prior to the SJA's post-trial review. The representation can be terminated for "good cause." For example, the separation of trial defense counsel from the service or where the defense counsel is on terminal leave in preparation of separation from the service. "Good cause" does not include reassignment of defense counsel, even to a distant location.

4. *United States v. Thomas*, 33 M.J. 694 (A.C.M.R. 1991). "If a lawyer believes he cannot represent a client competently, he should so inform the client and withdraw from representation subject to protection of the client's interest and the approval of the court." *Id.* at 701-2.

5. *United States v. Cornelious*, 41 M.J. 397 (1995). Once accused complains of counsel's performance, counsel should advise accused of consequences

of terminating attorney-client relationship and ask whether client wants to discharge him. If discharged, counsel should inform his superiors and take no further action on the case. If the matter can be resolved counsel can continue to act. On these facts, it was unclear whether defense counsel resolved this issue.

D. Interference with the Right to Counsel.

1. Taping conversations between attorney and client**.** *United States v. Walker*, 38 M.J. 678 (A.F.C.M.R. 1993). During pretrial confinement, the accused's phone calls to his attorney were tape-recorded and security police escorts overheard whatever he said. Four part test to analyze governmental interference with the right to counsel: (1) Did the government use evidence at trial which resulted from the intrusion? (2) Was the intrusion intentional? (3) Did the prosecution receive confidential information? and (4) Was the overheard information used against the defendant? *Id*. at 681.

2. When defense counsel testifies for the government**.**

a) *United States v. Sanders*, 31 M.J. 834 (N.M.C.M.R. 1990). Appellant was deprived of his Sixth Amendment right to counsel when his only defense counsel was used as prosecution witness. The defense counsel, as an officer of the court, was asked whether he had informed his client of the trial date. Based on the defense counsel's answer, the military judge determined that the trial could proceed in absentia. Another counsel should have been appointed.

b) *United States v. Smith*, 35 M.J. 138 (C.M.A. 1992). When the defense counsel is called to testify in the government's case on a contested or noncollateral matter the defense counsel should withdraw from representing the accused.

3. Consultations with Counsel.

a) *United States v. Cannon*, 39 M.J. 980 (A.F.C.M.R. 1994). Military judge who cut off counsel's attempt to confer with his client as to whether the judge's instruction was sufficient did not interfere with the right to counsel. "However, we believe that a defense counsel's request to consult with the client should be liberally granted to preserve the appearance of fairness in the judicial proceedings and to keep the client informed about the proceedings." *Id*. at 982.

b) *United States v. Evans*, 35 M.J. 754 (N.M.C.M.R. 1992). Following a request for a punitive discharge, the military judge should only ascertain the accused's understanding of the consequences of requesting a BCD and his desires in this regard. Questioning of the accused about his conversations with his counsel and the nature of the counsel's advice regarding the request for a BCD is an intrusion upon the privileged communications between client and counsel.

E. **Effective Assistance** (Ineffective = Deficient Performance + Prejudice). *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Babbitt*, 26 M.J. 157 (C.M.A. 1988).

1. Outcome determinative vs. result of proceeding rendered fundamentally unfair or unreliable.

a) *Lockhart v. Fretwell*, 506 U.S. 364 (1993). An analysis of ineffective assistance of counsel claim that focuses solely on outcome determination, without any attention to whether results of proceeding were fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant defendant windfall to which the law does not entitle him.

b) *United States v. Murphy*, 36 M.J. 1137, 1146 (A.C.M.R. 1993). "Even where a deficiency is found, the test is not solely a mere outcome determination but whether the result of the proceeding was fundamentally unfair or was unreliable."

c) *United States v. Tharpe*, 38 M.J. 8 (C.M.A. 1993). The Court uses the three-part analysis from *United States v. Polk* to address IAC: (1) Are the allegations true and if they are, is there a reasonable explanation for counsel's actions in defense of the case? (2) If they are true, did the level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? (3) If ineffective assistance of counsel is found to exist, is there a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?

2. Presumption of Competence.

a) *United States v. Sales*, 56 M.J. 255 (2002). At trial, the appellant denied knowing use of cocaine and on appeal he alleged that his counsel were ineffective for failing to contact a witness who

admitted to spiking appellant's drink with cocaine. In support of this allegation, appellant produced an affidavit in which the witness admitted to spiking the appellant's drink and stated that appellant's counsel never contacted him. The trial defense counsel's affidavit stated that he had contacted the witness and that the witness not only denied spiking the drink, but also refused to testify or cooperate. The CAAF held that the service court erred by not ordering a fact-finding hearing because the affidavits were not speculative or conclusory; the record as a whole did not compellingly demonstrate the improbability of the facts asserted by appellant and the witness; and there was a reasonable probability of a different result if the factual conflicts resolved in the appellant's favor.

b) *United States v. Grigoruk*, 52 M.J. 312 (2000). Defense counsel are presumed to be competent. *United States v. Cronic*, 466 U.S. 648 (1984). To overcome the presumption, the Court applied the three-part test from *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). The Court held that the accused's allegations were sufficient to order the defense counsel to explain why he did not call an expert at trial. In *United States v. Grigoruk*, 56 M.J. 304 (2002), CAAF found that defense counsel's decisions did not constitute ineffective assistance of counsel.

c) *United States v. Thompson*, 54 M.J. 26 (2000). Presumption of competence was overcome where the appellant alleged his defense team failed to interview witnesses, was unprepared for trial, entered into an illegal *sub rosa* agreement, and advised the accused to plead guilty to charges of which he was not guilty.

d) *United States v. Starling*, 58 M.J. 620 (N-M. Ct. Crim. App. 2003). At trial, after the trial counsel entered pertinent provisions of the appellant's service record, the trial defense counsel did not offer any evidence in extenuation or mitigation. During closing argument, the trial defense counsel highlighted favorable evidence from the appellant's service record. The trial defense counsel did not submit anything on behalf of appellant in post-trial clemency. Appellant asserted that his trial defense counsel was ineffective in failing to offer evidence in extenuation and mitigation and by failing to submit any post-trial clemency matters. The Navy-Marine Court expressly declined appellant's invitation to find that the failure to offer evidence in extenuation and mitigation or the failure to submit post-trial matters would constitute ineffectiveness *per se*. The court noted that trial defense's reference to favorable matters in the prosecution exhibit of appellant's service record "had the identical effect as if the defense had offered the identical

effect as if the defense had offered the same evidence in extenuation and mitigation." With respect to post-trial matters, the appellant did not submit any evidence that trial defense counsel acted contrary to his wishes nor had appellant submitted matters that would have been submitted but for the trial defense counsel's inaction.

3. Attorney's performance is deficient but no prejudice.

a) *United States v. Scott*, 51 M.J. 326 (1999) (defense counsel failed to object to expert testimony about future dangerousness).

b) *United States v. Straight*, 42 M.J. 244 (1995) (failure to request post-trial 39(a) session based on wrong belief that reconvened court could increase the sentence).

c) *United States v. Powell*, 40 M.J. 1 (C.M.A. 1994) (failure to object to unwarned admission and testimonial act of retrieving stolen merchandise from pants leg and failure to contact character witness deployed for Operation Desert Storm);

d) *United States v. Marrie*, 39 M.J. 993 (A.F.C.M.R. 1994), *aff'd in part*, 43 M.J. 35 (1995) (failure of civilian defense counsel to interview child psychiatrist who examined 9-year-old victim in sexual abuse case).

e) *United States v. Richardson*, 34 M.J. 1015 (A.C.M.R. 1992) (failure to raise adequately the issue of pretrial restraint was error, however, her performance did not amount to ineffective assistance of counsel since the restrictions on the accused prior to trial did not amount to restriction tantamount to confinement);

f) *United States v. Bell*, 38 M.J. 523 (A.C.M.R. 1993) (defense counsel should have asked victim in rape case whether she had martial arts training).

g) *United States v. Thomas*, 38 M.J. 614 (A.F.C.M.R. 1993) (failure to cross-examine witness whose testimony was based on a suggestive lineup).

h) *United States v. Cornelius*, 37 M.J. 622 (A.C.M.R. 1993) (counsel incorrectly advised client that guilty plea would not waive speedy trial motion).

i) *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993) (failure to present evidence of accused's awards in E & M, however judge inquired *sua sponte* so no prejudice).

j) *United States v. Taylor*, 38 M.J. 254 (C.M.A. 1993) (during sentencing phase defense counsel presented statement by company commander that accused should not remain in the Army, failure to ask the judge to disregard inadmissible portion was deficient performance).

4. Defense counsel had sound tactical strategy.

a) *Yarborough v. Gentry*, 124 S. Ct. 1 (Oct. 20, 2003) (*per curiam*). Noting that the Sixth Amendment "guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight," the Supreme Court reversed a Ninth Circuit Court of Appeals decision that found defense counsel ineffective because of errors of commission and omission during closing argument. The Ninth Circuit noted several points that the defense counsel could have made, but failed to do so, and on alleged errors of including other points, "'none of which mattered as a matter of law.'" The Supreme Court observed that defense counsel has wide latitude in representing a client and "deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." The Court declared that, during closing argument, "which issues to sharpen and how best to clarify them are questions with many reasonable answers."

b) *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). Accused pled guilty to unpremeditated murder. He argued on appeal that failure to call military witnesses to testify about his rehabilitation potential was ineffective. Post-trial declarations from witnesses indicated that they would testify concerning accused's military character and performance but not about his rehabilitation potential. Appellate court did not equate good military character with rehabilitation potential. Defense counsel made tactical decision to present accused's military character through service book entries because he was concerned about the likelihood of very effective cross-examination of military character witnesses. Defense counsel was not ineffective.

c) *United States v. Terlep*, 57 M.J. 344 (2002). Appellant alleged that it was ineffective assistance of counsel to fail to object to the assault victim's testimony during presentencing that she was raped,

in light of the stipulation of fact to an assault not rape. CAAF concluded that the victim's testimony did not contradict the stipulation of fact because the stipulation did not expressly state that a rape did not occur; it did not state that the touchings to which the appellant plead guilty were the only touchings that occurred that night; it was "not necessarily inferable from the sexual assaults stipulated to that a rape did not also occur;" and the defense counsel indicated that he understood the stipulation of fact was limited and that the parties had additional evidence as to the events that had occurred. Because the stipulation of fact was not contradicted, the defense counsel's failure to object was not ineffective.

d) *United States v. Vines*, 57 M.J. 519 (A.F. Ct. Crim. App. 2002). Appellant alleged that his trial defense counsel was ineffective for failing to call witnesses to testify about the victim's conduct the day after the alleged attack; for failing to ask the military judge to reconsider his ruling excluding evidence that the victim and her boyfriend engaged in a wrestling match a few days earlier, to show possible source of injury; for failing to call the defense expert to testify that the victim suffered from a personality disorder and had Attention Deficit Hyperactivity Disorder, making her less credible; and for failing to ask the military judge to reconsider his ruling excluding evidence that the victim made a rape allegation against her boyfriend as evidence of bias. Applying the standard of review set out in *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991), the Air Force Court held that the defense counsel's performance was not deficient and that the appellant was not denied effective assistance of counsel.

e) *U.S. v. Dewrell*, 55 M.J. 131 (2001). Appellant alleged that counsel failed to attack government witness credibility, did not do enough to limit spillover effect of rape testimony, did not inform members of consequences of punitive discharge, did not allow him to testify, failed to put on "good soldier" defense. The "barebones" assertion that right to testify was abridged was insufficient to require a hearing to determine the truth of the claim. Tactics held to be "well within their discretion."

f) *U.S. v. Clark*, 55 M.J. 555 (Army Ct. Crim. App. 2001). Counsel employed accident reconstruction expert to investigate accident and provide report. Neither counsel personally interviewed the witness, and for tactical reasons, they did not call him to testify at trial. CAAF determined that appellant had met his "threshold burden" to demonstrate ineffective assistance of counsel and remanded. On remand, Army Court found this to be a reasonable

tactical call, and, assuming *arguendo* that the first prong of *Strickland* was met, held that the appellant was not deprived of a fair trial.

g) *United States v. Bray*, 49 M.J. 300 (1999). Defense counsel was not ineffective by calling a sentencing witness to testify about the effects of pesticide exposure on the accused and the offenses. The military judge found this raised a possible defense of lack of mental responsibility and would not allow the accused to plead guilty.

h) *United States v. Young*, 50 M.J. 717 (Army Ct. Crim. App. 1999). This case demonstrates how little a defense counsel can do and still be effective. The defense counsel were not ineffective even though they did not make an opening statement, made no attempt to present relevant expert testimony, presented no defense on the merits, and presented no evidence in extenuation and mitigation.

i) *United States v. Loving*, 41 M.J. 213 (1994), *aff'd* 517 U.S. 748 (1996). Defense counsel was not ineffective for failure to present a voluntary intoxication defense and evidence of the accused's mental condition. The decision not to present the evidence was made after careful consideration by the defense team.

j) *United States v. Curtis*, 38 M.J. 530 (N.M.C.M.R. 1993). Counsel's theory that accused killed LT out of rage over racial discrimination was reasonable even though alternative theory that accused's genetic, family, and psychological background led to the killing was also possible.

k) *United States v. Cordes*, 33 M.J. 462 (C.M.A. 1991). Although the defense request for an administrative discharge may have caused military authorities to reconsider the appropriateness of initial referral of accused's case to a special court-martial and ultimately led to referral to a general court-martial, the defense counsel's decision to submit the request was not ineffective, given the fact that the government may have been interested in a quick resolution of the case.

5. Prejudice found.

a) *United States v. Garcia*, 59 M.J. 447 (2004). Appellant received ineffective assistance of counsel when his civilian defense counsel waived the Article 32 investigation without the appellant's

consent, and when his military defense counsel did not explain all options available to the appellant before confessing his involvement in the charged criminal misconduct during the defense's case-in-chief.

b) *United States v. Paaluhi*, 54 M.J. 181 (2000). The Court found deficient performance by counsel when the defense counsel advised the accused to speak to a government psychologist who had not been officially detailed to assist in the defense. This advice was given 8 days before *Jaffee v. Redmond*. The Court also found prejudice because the government's case, without the accused's admissions to the psychologist, was weak.

c) *United States v. Alves*, 53 M.J. 286 (2000). Counsel's performance on the merits was deficient, but the accused was not prejudiced. Counsel failed to interview six Marines that may have witnessed the assault or the events leading up to it. Counsel's failure to interview several witnesses about the accused's duty performance was deficient and prejudiced the accused. However, no relief was granted in view of "the substantial clemency" given by the convening authority when this issue was raised during post-trial.

d) *Anderson v. Johnson*, 338 F.3d 382 (5th. Cir. 2003). Trial defense counsel did not interview one of two adult witnesses to shooting (a third witness was a child). This witness would have testified that petitioner was not the assailant. The Court of Appeals found such a failure to be below the objective standard of reasonableness. Prejudice found given the weak state of the evidence against the petitioner (no physical evidence against the petitioner and other adult witness identified him only by chance meeting three years after the event).

e) *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003). Totality of mitigation evidence presented during the trial was defendant's unsworn statement that he was not guilty even though defense counsel knew that the defendant suffered from a brain injury sustained after falling from a ladder four years earlier. Understanding that "residual doubt" is not a mitigating factor under Ohio state law, the Court of Appeals noted, "We can conceive of no rational trial strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any 'residual doubt' about his guilt." *Id.* at *31-32. The Court of Appeals found that counsel's

performance was not objectively reasonable and that its confidence in the result was thereby undermined.

F. Capital murder is different.

1. *United States v. Curtis*, 46 M.J. 129 (1997). After reconsideration, CAAF changed its position, and held, in a very brief opinion, that counsel's performance during the sentencing phase of trial was ineffective. Chief Judge Cox, in a concurring opinion denying the government's petition for reconsideration, wrote that in "order to ensure that those few military members sentenced to death have received a fair and impartial trial within the context of the death-penalty doctrine of the Supreme Court, we should expect that:

a) each military service member has available a skilled, trained, and experienced attorney;

b) all the procedural safeguards prescribed by law and the Manual for Courts-Martial have been followed; and,

c) each military member gets full and fair consideration of all pertinent evidence, not only as to findings but also as to sentence."

2. **Failure to present mitigation evidence was not deficient, despite trial defense counsels' admissions of ineffectiveness.** *United States v. Simoy*, 46 M.J. 592 (A.F. Ct. Crim. App. 1996). During the defense sentencing case, the civilian defense counsel presented no live witnesses. Appellant's two military lawyers agreed in post-trial affidavits that they and appellant's civilian attorney were ineffective in their representation during the sentencing phase of appellant's trial because they conducted an inadequate pretrial investigation; submitted no evidence in mitigation; did not develop a theme for the sentencing case; and did not request services of a mitigation specialist or any special mitigation instructions. The Court concluded that, despite the affidavits, the appellant was ably represented and that failure to use a mitigation specialist was not *per se* ineffective. *See also United States v. Loving*, 41 M.J. 250 (1994).

3. *United States v. Murphy*, 50 M.J. 4 (1998). CAAF set aside the case for three reasons relating to the assistance of counsel. First, an unresolved conflict of interest may have prejudiced the sentencing phase. Second, the inadequate investigation by the defense counsel and their lack of capital experience and knowledge called the death sentence into question. Third, the Court remanded the case to determine if an unexplored issue of

Murphy's mental status at the time of the offenses prevented him from receiving a fair trial.

G. **The Defense Team.** *United States v. Wean*, 45 M.J. 461 (1997). The *DuBay* judge was correct in his ruling that the accused was denied effective assistance of counsel in the following three areas: first, the defense's approach to cross-examination and use of expert witnesses in the area of "play therapy" and failure to object to numerous hearsay statements demonstrated a lack of understanding of the law and a failure to properly research the issues; second, the division of responsibilities between the civilian defense counsel and military counsel revealed that there was little discussion of the issues, the law, or the case methodology; and third, civilian defense counsel, after the accused consistently denied his guilt, essentially conceded guilt during the sentencing phase, and stated that the accused was suffering from "an illness of the mind [which] compelled him to do these things."

H. **Seizure of Privileged Information.** *United States v. Tanksley*, 54 M.J. 169 (2000). When the accused was arrested and placed into pretrial confinement, the duty officer went to the accused's office to secure his personal possessions. When the duty officer was in the office, he noticed a document on the computer screen entitled "Regarding the charges now pending against me." The accused was preparing this document for his attorney. The duty officer printed a copy of the document. The accused claimed a violation of the right to counsel. Seizure of privileged communication can be a violation of the right to counsel, but there is no *per se* rule. Because the document was exculpatory, not used at trial, did not reveal any confidential information about defense strategy, and produced no information or leads the government did not already have, CAAF found no violation of the right to counsel.

I. **Sentencing.**

1. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). Petitioner convicted of capital murder by trial judge. He elected to be sentenced by a jury, which sentenced him to death. His public defenders moved to bifurcate the sentencing proceedings seeking to show that Wiggins did not kill the victim by his own hand and then, if necessary, to present a mitigation case. The trial judge denied the motion. One of his PDs told the jury that they would hear about Wiggins' difficult life, but did not present any such evidence. Wiggins argued that his counsel were ineffective for failing to investigate and present mitigating evidence about his background. The Court found the PDs to be ineffective. The Court focused not on whether they should have presented a mitigation case, but rather whether the investigation supporting their decision was itself reasonable. The Court determined that the PDs did not conduct a reasonable investigation, relying only on a short presentencing investigation and Department of

Social Services records and not using allocated funds to commission a forensic social worker report, which was the standard for death penalty cases in Maryland. Court found prejudice because given the nature and extent of abuse in Wiggins' background, there was a reasonable probability that a competent attorney aware of his history would have introduced such evidence at sentencing, and that a jury hearing such evidence would have returned a different verdict.

2. *Bell v. Cone*, 535 U.S 685 (2002). Appellant was convicted of bludgeoning an elderly couple to death after a two-day shooting spree. During trial on the merits, the defense counsel introduced extensive mitigation evidence. In his opening statement at the sentencing hearing for the murders, the defense counsel reminded jurors of the mitigation evidence and urged the jury to impose a life sentence. The defense counsel also cross-examined prosecution sentencing witnesses; however he did not call any witnesses for the defense and waived final argument. The appellant was sentenced to death. The Supreme Court held that by waiving the final argument, the defense counsel prevented the prosecutor from depicting the appellant as a "heartless killer" in rebuttal, and that the state court's determination that this was a tactical decision, about which competent lawyers might disagree, was reasonable.

3. *United States v. Burt*, 56 M.J. 261 (2002). CAAF found the defense counsel was not ineffective during sentencing when he agreed during argument that the appellant had no rehabilitative potential, because he did not specifically concede a punitive discharge. Additionally, it was not ineffective for the defense counsel to reject for tactical reasons a proposed instruction that appellant would lose his retirement benefits if the panel adjudged a punitive discharge

4. *United States v. Kreutzer*, 59 M.J. 773 (Army Ct. Crim. App. 2004). Appellant wounded seventeen and killed one 82d Airborne Division soldier during a PT formation at Fort Bragg. He was found guilty, *inter alia*, of one specification of premeditated murder and sentenced to death. The Army Court determined that defense counsel were ineffective in failing to discover and evaluate the "full range of psychiatric evidence and expert opinion available to be used in mitigation." The defense team was also ineffective for failing to interview the deceased soldier's wife, a principal witness in the government's sentencing case. Citing *Wiggins*, the Army Court held that "[d]efense counsel's investigation into appellant's mental health background fell short of reasonable professional standards."

5. *United States v. Saintaude*, 56 M.J. 888 (Army Ct. Crim. App. 2002). Appellant's counsel were ineffective when they failed to research whether the appellant's *nolo contendere* pleas in state court were convictions under

Florida law and, thus, properly considered by the panel during sentencing. This error was aggravated when the defense counsel conceded that these pleas constituted convictions. In addition, the defense team neither investigated the appellant's background for potential mitigation evidence nor presented available mitigation evidence. Based on these errors, the Army Court set aside the sentence. The Army Court also cautioned that defense counsel's argument for a specific period of confinement, without appellant's consent, was also deficient.

6. *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). Appellant alleged that his defense counsel provided ineffective assistance by failing to require the prosecution to stipulate as a fact that appellant had outstanding rehabilitative potential and by failing to object to the First Sergeant's testimony that the appellant had no rehabilitative potential. The Air Force disagreed, holding that appellant was not entitled to a stipulation of a witness' opinion as a matter of fact, that defense counsel's failure to object to the First Sergeant's testimony did not contradict the existing stipulation of fact, and that it was not error for the trial counsel to present proper evidence of rehabilitative potential under R.C.M. 1001(b)(5).

7. *United Stated v. Weathersby*, 48 M.J. 668 (Army Ct. Crim. App. 1998) Accused was deprived of effective assistance of counsel during sentencing, where trial defense counsel failed to present any matter in mitigation to the military judge. Appellant had twenty-four years of service at the time of trial. Court concluded that counsel failed to take adequate steps to identify potential matters in mitigation or to evaluate adequately information that had been brought to their attention. *See United States v. Palenius*, 2 M.J. 86, 90 (C.M.A. 1977).

J. Post-trial matters.

1. *United States v. Key*, 57 M.J. 246 (2002). Appellant alleged that his trial defense counsel were ineffective because he could not remember being advised by his counsel about the possibility of requesting waiver of forfeitures. Citing to *United States v. Lewis*, 42 M.J. 1 (1995), CAAF disagreed, holding that the appellant's assertion was too equivocal and ambiguous to overcome the presumption of competence. Even if the appellant could overcome the *Lewis* hurdle, however, he was not prejudiced. There was no reasonable likelihood that the convening authority would have granted a request to waive the forfeitures for the appellant's child after he denied an earlier request to defer the forfeitures for the same purpose.

2. *United States v. Gilley*, 56 M.J. 113 (2001). On appeal, appellant claimed that his defense counsel was ineffective when he submitted extremely inflammatory letters from appellant's family members as part of the post-trial clemency matters. In an affidavit, appellant claimed that his defense counsel never discussed the contents of the letters with him, other than to say that they contained curse words and should be re-written. CAAF agreed, finding that the defense counsel failed to make an evaluative judgment on what items to submit to the convening authority; that there was no reasonable explanation for the inclusion of the letters; that the inclusion of the letters fell way below the normally expected standard of performance and that there was a reasonable probability that, had the letters not been submitted, there would have been a different result.

3. *United States v. Dorman*, 58 M.J. 295 (2003). Pursuant to his pleas, appellant convicted of attempted wrongful use of a controlled substance, three specifications of wrongful use of controlled substance, and wrongful distribution of a controlled substance, in violation of Articles 80 and 112a, UCMJ. The issue at bar was whether trial defense counsel must grant appellate defense counsel access to the case file on request, irrespective of a claim of ineffective assistance of counsel. Recalling that an accused has the right to the effective assistance of counsel through completion of appeal and that trial defense counsel maintains a duty of loyalty to an appellate during appellate review, CAAF held that trial defense counsel must, on request, supply appellate defense counsel with the case file, but only after receiving the client's written release.

4. **Failure to appoint new defense counsel**. *United States v. Knight*, 53 M.J. 340 (2000). CAAF returned the case for a new recommendation and action because the accused was denied his right to counsel. The accused expressed dissatisfaction with his defense counsel and indicated that he was going to hire a civilian counsel for post-trial submissions. When the accused submitted his post-trial matters without counsel, the staff judge advocate should have, but did not, make sure that the accused was appointed a new defense counsel.

5. **Failure of substitute counsel to establish attorney-client relationship.** *United States v. Howard*, 47 M.J. 104 (1997). Substitute counsel, appointed for post-trial matters, never contacted appellant and never entered into an attorney-client relationship with appellant as required under RCM 1106(f)(2). Further, substitute counsel failed to consult with the accused about defense submissions under RCM 1105 and 1106. The Court determined the appellant made a "colorable showing of possible prejudice" that warranted remand for a new recommendation and action. *See also United States v. Miller*, 45 M.J. 149 (1996) articulating the test for prejudice when substitute counsel appointed but does not enter into

attorney-client relationship with appellant). *See also United States v. Hickok*, 45 M.J. 142 (1996).

6. *United States v. Wiley*, 47 M.J. 158 (1997). Staff Judge Advocate's post-trial recommendation contained substantial errors that defense counsel failed to correct. Though the Court held that appellant was not prejudiced, Judge Effron dissented, averring that this failure to correct serious errors was a denial of effective assistance.

7. *United States v. Voorhees*, 50 M.J. 494 (1999). Defense counsel were not ineffective where they failed to object to the convening authority's post-trial review after the convening authority told the accused that if the accused didn't take the pretrial agreement, "I'm going to burn you."

K. Post-Trial Matters – Need for "Informative Discussions."

1. **Accused controls what is submitted**. *United States v. Hicks*, 47 M.J. 90 (1997). Defense counsel prepared and discussed the clemency package with the appellant, but was "deficient" because he did not "adequately explain" two of the clemency letters to his client. The accused has the right to submit or not to submit material to the convening authority over defense counsel's objection – the defense counsel provides tactical and strategic advice on what to submit. The defense counsel's deficiency did not prejudice the appellant.

2. *United States v. Hood*, 47 M.J. 95 (1997). The Court accepted as true the appellant's post-trial affidavits asserting that his substitute military defense counsel did not discuss the contents of the clemency package with him. The Court held that this alleged failure to consult was deficient, but that no prejudice resulted. The appellant alleged that had he been given the opportunity, he would have asked that one of his mother's three letters and his draft unsworn statement not be submitted with the rest of the materials.

3. *United States v. Sanders*, 37 M.J. 628 (A.C.M.R. 1993), *aff'd in part*, 41 M.J. 485 (1995). Defense counsel are not *per se* ineffective for failing to submit post-trial matters, regardless of how meritorious. Each case must be reviewed on its own merits. The accused's failure to contact his counsel or let counsel know how to contact him affected his ineffective assistance claim.

4. *United States v. Aflague*, 40 M.J. 501 (A.C.M.R. 1994). Record indicated that civilian defense counsel requested 3-week delay to submit clemency matters but nothing was submitted. Where no logical reason for failure to

submit post-trial matters is shown, counsel is no longer presumed to be effective.

5. *United States v. Dresen*, 40 M.J. 462 (C.M.A. 1994). Based on improper referral of one charge, post-trial matters asked for sentence rehearing or in the alternative, approval of the discharge but substantial reduction of the confinement. Counsel was ineffective in not discussing this request with the client whose chief concern was the punitive discharge. Returned for new action.

L. Waiver. *Iowa v. Tovar*, 124 S. Ct. 1379 (2004). Respondent pled guilty to a driving under the influence of alcohol (OWI) offense and waived his right to the assistance of counsel. During the judge's colloquy with the respondent, the judge informed him of his right to counsel, the nature of the offense, and the possible punishments. Tovar was later found guilty to two additional OWI offenses. The last offense was deemed a class D felony because of his two prior convictions. Tovar argued at the third trial that the first offense should be used as an aggravating factor because his waiver of his right to counsel was not voluntary, intelligent, and knowing. The trial judge denied Tovar's motion; the court found him guilty. The Iowa Supreme Court reversed requiring that an accused be advised, *inter alia*, that by waiving counsel, he could be overlooking a viable defense and he would lose an opportunity for an independent opinion on the wisdom of pleading guilty. In a unanimous opinion, the Supreme Court held that the Sixth Amendment requires only that the "trial court inform[] the accused of the nature of the charges against him, of his to be counseled regarding his plea, and of the range of allowable punishments attendant upon entry of a guilty plea." The additional warnings were not required as a matter of constitutional law. The Court noted, however, that states are free to adopt by statute, rule, or decisions any guides for the acceptance of an uncounseled guilty plea deemed useful.

M. **Appellate Review**: *United States v. Lewis*, 42 M.J. 1 (1995). Trial defense counsel should not be ordered to explain their actions until a court reviews the record and finds sufficient evidence to overcome the presumption of competence. Counsel's refusal to submit handwritten letter as part of post-trial matters was error. Counsel may advise client on contents of post-trial matters but final decision is the client's. CAAF rejects the Army Court's procedures for handling IAC allegations, originally set out in *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989).

IX. PUBLIC TRIAL

A. References.

1. Lieutenant Colonel Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 MIL. L. REV. 1 (2000).

2. Major Mark Kulish, *The Public's Right of Access to Pretrial Proceedings Versus the Accused's Right to a Fair Trial*, ARMY LAW., Sept. 1998, at 1.

B. "In addition to the Sixth-Amendment right of an accused to a public trial, the Supreme Court has held that the press and general public have a constitutional right under the First Amendment to access to criminal trials." *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).

1. "In *Waller v. Georgia*, . . . the Supreme Court applied the same test to a defendant's objection to closure of a suppression hearing as had been applied in First-Amendment cases, stating 'that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public'" *Hershey*, 20 M.J. at 436.

2. "Without question, the Sixth Amendment right to a public trial is applicable to courts-martial." *Id.* at 435.

C. First Amendment.

1. **The Test of Experience and Logic.** To determine if there is a media right of access to the proceedings, apply the test of experience and logic. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) [*PE I*].

a) Test of Experience. This part tests whether the United States has experienced a history of openness or public access to the type of proceeding at issue.

b) Test of Logic. This part tests whether public access to such proceedings logically plays a particularly significant role in the functioning of the judicial process and the government as a whole. At least six societal interests must be considered in evaluating the logic test:

(1) promotion of informed discussion of government affairs by providing the public with the more complete understanding of the judicial system;

(2) promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings;

(3) providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion;

(4) serving as a check on corrupt practices by exposing the judicial process to public scrutiny;

(5) enhancement of the performance of all involved; and

(6) discouragement of perjury. *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982).

c) If the proceedings have traditionally been open and public access is essential to the proper functioning of the judicial system, then the media has a qualified First Amendment right to attend the proceeding.

d) The media has standing to challenge an order closing the proceeding. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

2. The media has a right of access to:

a) Criminal Trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

b) Jury Selection Proceedings. *PE I*, 464 U.S. 501 (1984)

c) Probable Cause Hearings. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) [*PE II*]. *See also ABC, Inc. v. Powell*, 47 M.J. 363 (1997).

d) Suppression Hearings. *Waller v. Georgia*, 467 U.S. 39, 44-46 (1984) (holding closing the trial over defense objection violated the Sixth Amendment Right to a Public Trial; in *dicta* the Court recognized the media's right of access).

3. The party seeking closure must advance a compelling interest.

4. **Conduct a strict scrutiny analysis.** The judge must weigh the compelling interest asserted with the need and benefits for openness and make the following findings.

   a) Closure is essential to preserve a compelling interest

   b) The judge must make individualized case-by-case findings to justify the closure.

   c) The closure must be narrowly tailored to serve the compelling interest; the court must consider alternatives.

5. Mandatory closure statutes are unconstitutional. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-10 (1982).

6. Typical compelling interests.

   a) The accused's right to a fair trial. A proceeding cannot be closed unless the court makes a case specific finding that there is a substantial probability that the Sixth Amendment right to a fair trial will be prejudiced by publicity that closure would prevent and that reasonable alternatives to closure cannot adequately protect the right to a fair trial. *PE I*, 464 U.S. at 512.

   b) Privacy of juror. *PE I*, 464 U.S.501 (1984).

   c) Trial participant's safety. *Unabom Trial Media Coalition v. District Court*, 183 F.3d 949 (9th Cir. 1999).

   d) Well-being of a victim. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

   e) Disclosure of sensitive information. *United States v. Lonetree*, 31 M.J. 849 (N.M.C.M.R. 1990), *aff'd and rem'd*, 35 M.J. 396 (C.M.A. 1992).

   f) Protecting confidential law enforcement information. *Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997).

   g) Protecting trade secrets. *United States v. Andreas*, 150 F.3d 766 (7th Cir. 1998).

h) Concealing the identity of juveniles. *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995).

7. Military cases.

a) *United States v. Story*, 35 M.J. 677, 678 (A.C.M.R. 1992). "[P]rior to excluding all or portions of the public from viewing a court-martial, the military judge must articulate findings warranting, and limiting as narrowly as possible, the infringement upon the constitutional right of the public to attend courts-martial of the United States." *See United States v. Terry*, 52 M.J. 574 (N-M. Ct. Crim. App. 1999) (trial judge erred when he closed the courtroom during the testimony of a rape victim).

b) "It was stated in oral argument that it is practice in some military courts to bar admittance of spectators except during a recess. Employment of such a procedure is a denial of public access to courts-martial and should be discontinued." *Hershey*, 20 M.J. at 438 n.6.

c) *United States v. Short*, 36 M.J. 802 (A.C.M.R. 1993). When accused's mother-in-law and 3 small children entered courtroom, military judge said: "No . . . no, out . . . out. This is not a waiting room for babies." Although the judge should have articulated the reasons for the exclusion, there was no constitutional violation under the circumstances of this case.

8. Defense requested closure**.**

a) *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987). The accused wanted the courtroom closed because he was a confidential informant. The military judge refused. The accused did not present evidence of his cooperation with the Criminal Investigation Division. "Appellant was never denied the opportunity to present this evidence in an open courtroom; his failure to do so was his own election." *Id.* at 63.

b) *United States v. Fiske*, 28 M.J. 1013 (A.F.C.M.R. 1989). "This is the second case we are aware of in this decade that a military judge has closed an Air Force court-martial trial without a reason therefor being articulated on the record . . . *That's two too many*." *Id.* at 1013. The accused was a confidential informant who requested that the court be closed. There was no controversy; no one was complaining. The concurring opinion discussed three

guidelines concerning public trials. If the public wants access and accused wants the trial closed, the public wins. The majority reserved judgment on this issue.

D. Sixth Amendment.

1. *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985). No violation of the Public Trial Clause where the judge closed the courtroom for the testimony of a child victim of sexual abuse.

2. *United States v. Terry*, 52 M.J. 574 (N-M. Ct. Crim. App. 1999). Violation of the Public Trial Clause where the military judge, over defense objection, closed the courtroom during the testimony of the alleged rape victim.

3. Security Issues and Public Trials.

a) *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). No violation of the Sixth Amendment Public Trial Clause where the court was closed to received classified information.

b) *United States v. Lonetree*, 31 M.J. 849 (N.M.C.M.R. 1990), *aff'd in part*, 35 M.J. 396 (C.M.A. 1992). Mil. R. Evid. 505 (classified information) satisfied; no public trial violation. The military judge properly analyzed information and balanced competing interests before closing the court. When certain information is classified, a finding is not required each time the court is closed. Closings were "adequately tailored."

c) *United States v. Anzalone*, 40 M.J. 658 (N-M. Ct. Crim. App. 1994), *set aside on other grounds*, 43 M.J. 322 (1995). No violation of the right to a public trial when courtroom periodically closed during espionage trial. Court notes that closure was for short periods of time, when classified matters would be discussed, and only 16% of the record covered times when the public was excluded.

d) *United States v. Sombolay*, 37 M.J. 647 (A.C.M.R.). Provision in pretrial agreement for waiver of public trial not against public policy.

E. Issues.

1. RCM 806 allows a military judge to close a court-martial for good cause. This could be unconstitutional.

2. RCM 806 only allows a military judge to close a court-martial over the objection of the accused only when expressly authorized by the MCM.

3. Must the media and public receive notice before a court-martial can be closed?

4. RCM 405 allows an Article 32 Investigation to be closed in the discretion of the commander who ordered the investigation. *See ABC, Inc. v. Powell*, 47 M.J. 363 (1997).

5. MRE 412(c)(2) requires a closed hearing to determine the admissibility of evidence offered under Rule 412.

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